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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 JODIE D. GRAGG,

11 Petitioner,

12 v.

13 EDGAR KORZENOWSKI.

14 Respondent.

CASE NO. 11-cv-5451RJB

REPORT AND  
RECOMMENDATION

NOTED FOR : SEPTEMBER 2, 2011

15 This petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 has  
16 been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28  
17 U.S.C. § 636(b) (1) (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

18 On June 20, 2011, the court entered an order to show cause why this action  
19 should not be dismissed (ECF No. 6). Petitioner has failed to exhaust any claim in  
20 state court and failed to respond to the order to show cause. Petitioner filed this  
21 petition prior to his being sentenced. Petitioner has plead guilty in Grays Harbor  
22 Superior Court to trafficking in stolen property. The court recommends the petition be  
23 dismissed without prejudice as unexhausted.  
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## STANDARD OF REVIEW

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). Section 2254 explicitly states that a federal court may entertain an application for writ of habeas corpus “only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States.” 28 U.S.C. § 2254(a) (1995). The Supreme Court has stated many times that federal habeas corpus relief does not lie for mere errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991); Lewis v. Jeffers, 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S. 37, 41 (1984);

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). Further, a determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

## DISCUSSION

### *Exhaustion.*

A state prisoner seeking habeas corpus relief in federal court must exhaust available state relief prior to filing a petition in federal court. As a threshold issue the court must determine whether or not petitioner has properly presented the federal habeas claims to the state courts. 28 U.S.C. § 2254(b)(1) states, in pertinent part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that:

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available state corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

To exhaust state remedies, petitioner's claims must have been fairly presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 275 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985) (petitioner "fairly presented" the claim to the state Supreme Court even though the state court did not reach the argument on the merits).

Petitioner must have exhausted the claim at every level of appeal in the state courts. Ortberg v. Moody, 961 F.2d 135, 138 (9th Cir. 1992). It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. Duncan v. Henry, 513 U.S. 364, at 365-66 (*citing* Picard, 404 U.S. at 275 *and* Anderson v. Harless, 459 U.S. 4 (1982)).

1 Petitioner admits not having brought his claims to the state court system in the petition  
2 (ECF No. 5). In fact, petitioner had not been sentenced for his plea of guilty on the charge  
3 of trafficking in stolen property when he filed this petition (ECF No. 5).

#### 4 **CERTIFICATE OF APPEALABILITY**

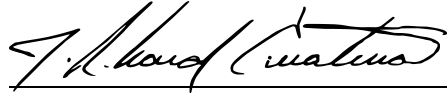
5 A petitioner seeking relief under 28 U.S.C. § 2254 may appeal a district court's  
6 dismissal of his federal habeas petition only after obtaining a certificate of  
7 appealability (COA) from a district or circuit judge. A certificate of appealability  
8 may issue only where a petitioner has made "a substantial showing of the denial of a  
9 constitutional right." See 28 U.S.C. § 2253(c) (3). A petitioner satisfies this standard  
10 "by demonstrating that jurists of reason could disagree with the district court's  
11 resolution of his constitutional claims or that jurists could conclude the issues  
12 presented are adequate to deserve encouragement to proceed further." Miller-El v.  
13 Cockrell, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that  
14 petitioner is not entitled to a certificate of appealability with respect to this petition.  
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16 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall  
17 have fourteen (14) days from service of this Report to file written objections. See also  
18 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of de novo review by  
19 the District Court Judge. See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit  
20 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
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1 September 2, 2011 as noted in the caption.

2 Dated this 8th day of August, 2011.

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5 J. Richard Creatura  
6 United States Magistrate Judge  
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